Lau Kung Seng & Ors v Public Prosecutor

HIGH COURT (MIRI) — CRIMINAL REVISION NO 43-01 OF 1996 (BTU)
ELIZABETH CHAPMAN JC
16 OCTOBER 1996

Criminal Procedure *— Bail — Granting of — Pending trial — Factors to be considered in granting bail — Whether bail could be refused because of previous conviction — Whether cash bail permitted in law — Criminal Procedure Code (FMS Cap 6) ss 389–391 & 403*

This was an application for a revision of a magistrate's court order in relation to bail. The four applicants were each charged for an offence which carries a maximum term of two years' imprisonment or a fine of RM2,000 or both. Pending the trial, the court ordered that the first, second and fourth applicants to be released on bail with cash to be deposited in court. The third applicant was refused bail because of a previous conviction. The issues before the court concerned the factors to be considered in granting bail and whether cash bail was permitted in law.

Held, allowing the application and ordering accordingly:

(1) In considering whether bail should be granted, the court is duty bound to consider various factors such as the nature of the offence, the penalty provision, the likelihood of the accused absconding and whether the accused, if released on bail, would interfere with the prosecution witnesses or the investigation of the case. None of these factors was ever considered by the court below and the third applicant was refused bail because of his previous conviction and the court below believed that granting him bail would run a risk of him absconding. There was nothing on record to substantiate or support this belief. To refuse bail on the ground that an accused person had a previous conviction is not justifiable particularly when the prosecution does not even offer any reasons that there was a likelihood the accused might abscond. However bad a character an accused may possess, he is undoubtedly entitled to be proceeded against according to law and not to be deprived of his liberty except in due course of law. Hence, where an accused is rightly entitled to be on bail, his bail cannot be cancelled except in due course of the law (see pp 325I and 326A–C); *Bashiruddin v R* AIR 1932 All 327 followed.

(2) The imposition of cash bail, otherwise that under the condition stipulated in s 403 of the Criminal Procedure Code (FMS Cap 6), is illegal. A magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety of some persons (see pp 326I and 327A–B); *RR Chari v Emperor* AIR 1948 All 238 followed.

[Bahasa Malaysia summary

Ini adalah satu permohonan untuk penyemakan perintah mahkamah majisteret yang berkaitan dengan ikat jamin. Keempat-empat pemohon telah didakwa dengan kesalahan yang membawa hukuman maksimum dua tahun penjara atau denda RM2,000 atau kedua-duanya sekali. Sementara menunggu perbicaraan, mahkamah telah memerintahkan bahawa pemohon pertama, kedua dan keempat dibebaskan dengan ikat jamin dan wang tunai dideposit di mahkamah. Pemohon ketiga tidak dibenarkan ikat jamin kerana pernah disabitkan dengan kesalahan terdahulu. Isu di hadapan mahkamah adalah berkenaan dengan faktor-faktor yang perlu dipertimbangkan dalam membenarkan ikat jamin dan sama ada ikat jamin dengan wang tunai dibenarkan di sisi undang-undang.

Diputuskan, membenarkan permohonan dan perintah sewajarnya:

(1) Dalam mempertimbangkan sama ada ikat jamin patut dibenarkan, mahkamah berkewajipan mengambil kira beberapa faktor seperti ciri-ciri kesalahan, peruntukan penalti, kemungkinan tertuduh melarikan diri dan sama ada tertuduh, jika dibebaskan dengan ikat jamin, akan mengganggu saksi-saksi pendakwa atau penyiasatan kes. Faktor-faktor ini telah tidak diambil kira oleh mahkamah rendah dan pemohon ketiga telah tidak dibenarkan ikat jamin kerana sabitannya dahulu dan mahkamah rendah telah berpendapat bahawa dengan membenarkan ikat jamin terdapat risiko yang dia akan melarikan diri. Tiada apa-apa atas rekod yang dapat menyokong pendapat ini. Untuk menolak ikat jamin atas alasan bahawa seorang tertuduh mempunyai sabitan terdahulu tidak mempunyai justikasi terutamanya apabila pihak pendakwa tidak mengemukakan apa-apa alasan bahawa terdapat kemungkinan tertuduh akan melarikan diri. Bagaimana buruk sekalipun peribadi yang dimiliki oleh tertuduh, beliau berhak untuk diambil tindakan mengikut undang-undang dan tidak boleh dilucutkan kebebasannya melainkan mengikut undang-undang. Oleh itu, di mana tertuduh adalah berhak kepada ikat jamin, ikat jaminnya tidak boleh dibatalkan melainkan mengikut undang-undang (lihat ms 325I dan 326A–C); *Bashiruddin v R* AIR 1932 All 327 diikut.

(2) Mengenakan ikat jamin tunai, melainkan di bawah syarat-syarat yang dinyatakan dalam s 403 Kanun Acara Jenayah (NMB Bab 6), adalah salah di sisi undang-undang. Majistret tiada kewajipan untuk menerima wang tunai, tetapi boleh membenarkan seseorang tertuduh mencagarkan wang tunai sebagai ganti kepada melaksanakan bon peribadi dan memberi jaminan beberapa orang (lihat ms 326I dan 327A–B); *RR Chari v Emperor* AIR 1948 All 238 diikut.]

Notes

For cases on granting of bail, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 544–558.

Cases referred to

Bashiruddin v R AIR 1932 All 327 (folld)
R v Rose (1891) 67 LJQB 289; 17 Cox 717 CCA (refd)
RR Chari v Emperor AIR 1948 All 238 (folld)

Legislation referred to

Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 7(1)
Criminal Procedure Code (FMS Cap 6) ss 389, 390, 391, 403
Penal Code (FMS Cap 45) s 34
Criminal Procedure Code s 499 [India]
Criminal Procedure Code s 441 [India]

Orlando Chua (*Wong Orlando Chua & Co*) for the applicants.
Awang Armadajaya (Deputy Public Prosecutor) for the respondent.

Elizabeth Chapman JC: Upon application by learned counsel for the applicants for a revision, the court called for the record of proceedings of the lower court with a view to the exercise of its powers under s 323 of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

The four applicants in this case were brought before the magistrate's court in Bintulu on a charge under s 7(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 read with s 34 of the Penal Code (FMS Cap 45). The said offence carries a maximum term of two years imprisonment or a fine of RM2,000 or both.

The court below had — pending the trial of the four applicants — made the following orders:

(1) the first applicant was ordered to be released on bail in the sum of RM10,000 with two local sureties. In addition, RM2,000 cash was ordered to be deposited in court;

(2) the second applicant was released on bail in the sum of RM20,000 with two local sureties in addition to RM4,000 cash deposit in court;

(3) the third applicant was ordered to be remanded in prison custody pending trial; and

(4) the fourth applicant was released on bail in the sum of RM10,000 with two local sureties with RM1,000 cash to be deposited in court.

From a perusal of the record, the learned magistrate had clearly been influenced by the previous conviction of the third applicant when he refused bail in his case. The second applicant had three cases before the same court and was released on bond of good behaviour, likewise with the fourth applicant.

In considering whether bail should be granted, the court is duty bound to consider various factors such as the nature of the offence, the penalty provision, the likelihood of the accused absconding and whether the accused, if released on bail, would interfere with the prosecution witnesses or the investigation of the case. None of these was ever considered

by the court below and in the case of the third applicant, bail was refused because of his previous conviction and so granting him bail would run the risk of him absconding. There was nothing on record to substantiate or support this belief. To refuse bail on the ground that an accused person had a previous conviction is not justifiable particularly when the prosecution does not even offer any reasons that there was a likelihood the accused might abscond. However bad a character an accused may possess, he is undoubtedly entitled to be proceeded against according to law and not to be deprived of his liberty except in due course of law. Hence, where an accused is rightly entitled to be on bail, his bail cannot be cancelled except in due course of the law (*Bashiruddin v R* AIR 1932 All 327). The test to be applied is whether it is probable that the accused will appear to take his trial, and consideration should be given to the seriousness of the charge, the nature of the evidence, the severity of the punishment awardable and in some instances, the character, means and standing of the accused. An accused person is presumed under the law to be innocent until his guilt is proved. It is well settled that bail will not be withheld merely as a punishment, and that the requirements as to bail are merely to secure the attendance of an accused person at the trial: *R v Rose* (1891) 67 LJQB 289; 17 Cox 717 CCA.

More importantly, the court has to consider whether cash bail is permitted in law and to this end, it is relevant to consider the provisions of ss 389, 390 and 391 of the CPC.

Sections 390 and 391 should be read together with s 403. When a person is required to execute a bond with or without sureties, the person may be permitted to deposit money. This deposit is in lieu of executing a bond. In my view, s 403 read with s 390 does not permit cash bail to be imposed.

Section 390 is similar to s 441 of the Indian CPC (new) and s 499 of the Indian CPC (old). Section 390 lays down the manner the bond must be executed.

In *RR Chari v Emperor* AIR 1948 All 238 at p 239, the court said:

> The language of s 499 of the Criminal Procedure Code makes it perfectly clear that what that section contemplates is the furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. The accused as well as the sureties have, therefore, to execute only bonds which are sufficient in the mind of the Magistrate for the amount which he might have fixed. This is also the view taken by the Patna High Court in AIR 1948 Pat 375 and I respectfully agree with it. Section 513 provides for a concession to an accused person who is unable to produce sureties. That section also makes it clear that the magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety of some persons. That section, however, does not authorize a demand of cash by a magistrate. Under these circumstances, even though an offer may have been made in this case by the counsel for the applicant, that offer was made after the magistrate apparently had made up his mind to demand cash security. It will not be covered by the terms of s 513 of the Criminal Procedure Code, and the demand of cash security in this case was clearly illegal.

A Likewise, in this present case the imposition of cash bail otherwise than under the condition stipulated in s 403 of the CPC is illegal. In the circumstances, the orders of the learned magistrate imposing cash bail on the applicants is reversed and instead each of the applicants shall execute a bail bond in the sum or RM5,000 with two sureties in accordance with s 390 of the CPC. Cash, if paid, is to be refunded.

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Order accordingly.

Reported by Zahid Taib

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